No. 94-87 (6)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ETHICON, INC.,

Petitioner,

—v.—

HELEN KIRWIN EISENMENGER, an incapacitated person, by VERONICA EISENMENGER, her Guardian and Conservator,

Respondent,

—and—

JAMES E. MUNGAS and MONTANA DEACONESS MEDICAL CENTER,

Cross-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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9pp

TABLE OF CONTENTS

		PAGE
THE BRIEFS IN OPPOSITION		1
I	THE EFFECT OF THE FINDING OF "BAD FAITH" DISCOVERY ABUSE	2
II	THE INTERPLAY BETWEEN RULE 37 AND DUE PROCESS	3
III	THE UNSETTLED QUESTION ON WHICH THE CIRCUITS ARE SPLIT	4

TABLE OF AUTHORITIES

Cases PAGE

Hammond Packing Co. v. *Arkansas*, 212 U.S. 322 (1909) 3

Hovey v. *Elliott*, 167 U.S. 409 (1897) 3

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) 4

Other Authorities

Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C. (1952 ed.) 3

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The Briefs In Opposition

The briefs in opposition filed by plaintiff Helen Eisenmenger and co-defendant Dr. James E. Mungas are devoted primarily to an attack on Ethicon's incomplete discovery responses and the trial court's finding that Ethicon engaged in a bad faith attempt to hide the opinion of its expert Dr. Olcott. But neither of these points is dispositive of the question

raised by Ethicon's petition, *viz*: whether, on the record of this case, the entry of a default judgment was consistent with the requirements of due process. Before that question can be answered, it must first be determined what standard governs the entry of default judgments in cases of discovery abuse.

Mrs. Eisenmenger and Dr. Mungas contend that it is enough that the Montana courts found that Ethicon had engaged in bad faith discovery abuse. Ethicon believes, however, that an additional inquiry must be made. That inquiry must focus on whether Ethicon's conduct, including its discovery "abuse", gives rise to a presumption that it had no defense whatsoever to the claim that its suture was defective. Whether this additional inquiry must be made is the basis of the conflict between the Circuits (as well as between the various State Supreme Courts) identified in our Petition.

I

THE EFFECT OF THE FINDING OF "BAD FAITH" DISCOVERY ABUSE

Ethicon does not dispute the rather obvious fact that the Montana courts found that it had acted in bad faith in failing to disclose its expert's opinion regarding the suturing technique utilized by Dr. Mungas. But this finding is not dispositive. Indeed, the question raised by Ethicon's Petition is whether this finding is sufficient *by itself* to satisfy the due process requirements for the entry of a default judgment.

That, of course, is the reason for the lengthy discussion of the record in Ethicon's Petition (pp. 11-18). What the record discloses is that, at most, Ethicon was guilty of failing to disclose the fact that its expert harbored an opinion that Dr. Mungas was negligent in affixing the original suture. Thus the trial court could well have found that Ethicon's failure to disclose that opinion was tantamount to an admission that it had no evidence of negligence on Dr. Mungas' part. But that is a far cry from finding that Ethicon implicitly admitted that it

had no evidence whatsoever to offer in its defense. Because the record plainly does not support that presumption, the entry of a default judgment was improper.

II

THE INTERPLAY BETWEEN RULE 37 AND DUE PROCESS

Ethicon likewise does not dispute the proposition that a proper application of Montana Rule 37 (which is identical to Federal Rule 37) satisfies the requirements of due process. As noted in our Petition (pp. 27-28), the Advisory Committee notes to Rule 37 specifically incorporate the constitutional limitation on default judgments reflected in this Court's opinions in *Hovey* v. *Elliott*, 167 U.S. 409 (1897), and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909).

The question in this case, as in any other case involving preclusory sanctions under Rule 37, is whether the Rule was properly followed and whether the sanction in question was appropriate. Indeed, the Advisory Committee has noted that the issue in a case involving preclusory sanctions under Rule 37 is whether those sanctions:

> "are in accord with *Hammond Packing* . . . which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey* v. *Elliott* . . . for the mere purpose of punishing for contempt." [Full citations omitted.]

The record in this case discloses beyond doubt that the default judgment was entered for the latter purpose, *i.e.* "for the mere purpose of punishing for contempt". This is impermissible. A "justifiable" sanction would have been one which was tied to the nondisclosure in question: Ethicon's failure to disclose Dr. Olcott's opinion regarding the negligence of Dr. Mungas. As noted above, the most that this nondisclosure

would justify is an order precluding Dr. Olcott from testifying about Dr. Mungas' negligence. Such a preclusion order—assuming the procedural requirements of Rule 37 had been followed—would have constituted a proper use of Rule 37 and hence would have been consistent with due process.[1]

III

THE UNSETTLED QUESTION ON WHICH THE CIRCUITS ARE SPLIT

The reason the Court should grant certiorari is because there is a split in the circuits on the dispositive issue in this case, *viz*: whether the finding that Ethicon acted in bad faith in failing to disclose Dr. Olcott's opinion about Dr. Mungas is sufficient to justify the entry of a default judgment. Prior to this Court's decision in *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639 (1976), it was well settled that the entry of a default judgment could not satisfy due process standards unless the conduct in question gave rise to a presumption that the offending party had no evidence to support its claim or defense. This remains the law in the Fifth and Ninth Circuits and in several states (see our Petition at pp. 21-23).

But in *National Hockey League*, this Court appeared to endorse the entry of a default judgment based *solely* on a finding that the defaulted party engaged in bad faith discovery abuse—without regard to whether the record supported a presumption that the party had no evidence to offer. This view has been followed by a majority of the circuits as well as a number of states (see our Petition at pp. 23-25). While the facts in most of these cases may well have supported a pre-

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[1] In fact, none of the procedural requirements of Rule 37 were met here. There was never (i) an order requiring Ethicon to provide the discovery in question nor (ii) a refusal by Ethicon to comply with such an order. Thus, under the express terms of Rule 37, the predicate for any preclusion sanction was totally absent.

sumption that the defaulted party had no evidence to offer, the cases were simply decided on the basis of bad faith, without regard to whether the presumption applied.

The decision below is a reflection of this unset tled law. Reviewing a record where the trial court had found "bad faith" discovery abuse by Ethicon, the Montana Supreme Court held that this finding was sufficient for due process purposes; it simply ignored the fact that the presumption mandated by *Hovey* and *Hammond Packing* does not exist. Until this Court clarifies the law in this area, there are going to be more and more instances of default judgments being entered as a punishment for discovery abuse and without any consideration of whether the defaulted party's conduct warrants the *Hammond Packing* presumption. As a result, those default judgments will have the effect of eviscerating a party's due process rights, as did the default judgment here.

We do not believe that this Court, in its *per curiam* decision in *National Hockey League*, intended to effect such a dramatic change in settled principles of due process. The Court should therefore use this case as a vehicle to rule that the understandable desire of the nation's trial courts to deal firmly with discovery abuse must be tempered by concern for the offending party's due process rights. Had the Montana courts given proper consideration to Ethicon's due process rights, they would have been required to craft a sanction which did not deprive Ethicon of its right to continue defending the case on the merits.

Respectfully submitted,

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